85-1908

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court Of The United States

October Term, 1985

NO._____

JOE SEPHEUS WESLEY ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS AND THE SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED

Whether the failure of the Judge to include in his instructions to the jury negligent homicide as a lesser included offense to manslaughter was a denial of due process.

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IN THE

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Term, 1986

JOE SEPHEUS WESLEY ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS AND THE SUPREME COURT OF ARKANSAS

Petitioner, Joe Sepheus Wesley, was sentenced to imprisonment in the Arkansas Department of Corrections (although, as of the preparation of this Petition, he is free on appeal bond) petitions for a writ of certiorari to review his conviction for manslaughter and the affirmance thereof by the Arkansas Court of Appeals and the Supreme Court of Arkansas.

OPINION BELOW

The written opinion of the Arkansas Court of Appeals, the intermediate appellate court of Arkansas, is reported as *Wesley v. State*, CACR 85-142 (Ark. Ct. App. Jan. 22, 1986) (Affirmed). Petitioner sought review by the Supreme Court of Arkansas which is discretionary in cases of this type, which was denied without written opinion. The opinion of the Arkansas Court of Appeals, as well as the letter from the Arkansas Supreme Court Clerk reporting denial of the Petition for Review, are reproduced in the Appendix.

JURISDICTION

The decision of the Arkansas Court of Appeals was issued on January 22, 1986. The Arkansas Supreme Court denied review March 3, 1986. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3), with Petitioner asserting a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment:

"...(N)or shall any state deprive any person of life, liberty, or property without due process of law..."

Ark. Stat. Ann. §41-1504. Manslaughter:

(1) A person commits manslaughter if:

(a) He causes the death of another person under circumstances that would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be;

(b) he purposely causes or aids another person to commit suicide;

(c) He recklessly causes the death of another person;

(d) acting alone or with one or more persons, he commits or attempts to commit a felony, and in the course of and in furtherance of the felony, or in immediate flight therefrom:

(i) He or an accomplice negligently causes the death of any person; or

(ii) Another person who is resisting such offense or flight causes the death of any person.

(2) It is an affirmative defense to any prosecution under subsection (1) (d) for an offense in which the defendant was not the only participant that the defendant:

(a) did not commit the homicide act or in any way solicit, command, induce, procure, counsel, or aid its commission; and

(b) was not armed with a deadly weapon; and

(c) reasonably believed that no other participant was armed with a deadly weapon; and

(d) reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury.

(3) Manslaughter is a Class C Felony.

Ark. Stat. Ann. §41-1505. Negligent Homicide:

(1) A person commits negligent homicide if he negligently causes the death of another person

(2) Negligent homicide is a Class A Misdemeanor.

STATEMENT OF THE CASE

Petitioner, Joe S. Wesley, was charged in Pulaski County Circuit Court with Murder in the First Degree in the death of Michael Rice. A jury trial was held in May of 1985. The trial court refused to give an instruction concerning negligent homicide while giving an instruction on manslaughter. As a result, the Petitioner was convicted of Manslaughter and sentenced to seven (7) years in the Arkansas Department of Corrections. From this conviction and sentence, Petitioner appealed to the Arkansas Court of Appeals which rendered a decision affirming the lower court on January 22, 1986. The Arkansas Supreme Court denied review March 3, 1986, this petition follows.

REASON FOR GRANTING THE WRIT

THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF NEGLIGENT HOMICIDE WAS A DENIAL OF DUE PROCESS.

This case affords the Court an opportunity to review a man's actions and by so doing assuring that man, the appellant, that he will receive a fair assessment of his situation.

The Fourteenth Amendment guarantees each citizen due process of law. This is not a technical concept but one based on fairness. It is a concept that ensures justice to all parties involved. The failure of a state court to instruct a jury on lesser included offenses violates the Fourteenth Amendment because the failure to give the requested instruction deprives the defendant of the fundamental right to a fair trial. *Brewer v. Overberg*, 624 F. 2d 51 (1980).

A defendant is entitled to a lesser included offense if: (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence which would justify conviction of the lesser offense; (4) the proof on the element or elements differentiating the two crimes

is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense; and (5) there is mutuality. *United States v. Thompson*, 492 F.2d 359, 362 (1974).

In the case at bar, the trial court refused to give the instruction concerning negligent homicide and, in so doing, denied Appellant's right to due process. The trial court instructed the jury on first degree murder, second degree murder, and manslaughter. The trial court refused to instruct the jury on negligent homicide. However, in Arkansas, negligent homicide is a lesser included offense of manslaughter. *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978).

The appellee would argue that the actions of the Appellant were not negligent—that he did not have the less culpable mental state required for negligent homicide. And yet, being aware of one's actions does not encompass the mental state required for a crime of specific intent. One may be cognizant of the circumstances and one's actions and still not intend the result of them. *Bowen v. State*, 268 Ark. 1088, 598 S.W.2d 447 (1980).

CONCLUSION

The petition for writ of certiorari should be granted and the holding of the Arkansas court reversed. The Court should set this matter for oral argument on the issues outline above.

Respectively submitted.

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By: /s/Darrell F. Brown
Darrell F. Brown
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on the Honorable John Langston, Pulaski County Courthouse, and Steve Clark, Attorney General, Heritage West Building, Little Rock Arkansas, by placing same, properly addressed, in the United States Mail with sufficient postage to insure delivery this 23rd day of April, 1986.

Darrell F. Brown

APPENDIX

DIVISION I

ARKANSAS COURT OF APPEALS

NO. CACR 85-142
Opinion Delivered January 22, 1986
AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION

HONORABLE JOHN LANGSTON
CIRCUIT JUDGE

AFFIRMED

JOE S. WESLEY ..... *Appellant*
VS.
STATE OF ARKANSAS ..... *Appellee*

DONALD L. CORBIN, *Judge*

Appellant, Joe S. Wesley, was charged with murder in the first degree in the death of Michael Rice. Appellant was convicted of manslaughter by a Pulaski County jury and sentenced to seven years in the Arkansas Department of Correction. He appeals from this conviction, alleging that the trial court erred in refusing to instruct the jury on the lesser included

offense of negligent homicide, Ark. Stat. Ann. §41-1505 (Repl. 1977), and the recklessness prong of manslaughter, Ark. Stat. Ann. §41-1504(1)(c) (Repl. 1977). We affirm.

Appellant's argument pertaining to the trial court's refusal to instruct the jury on the recklessness prong of manslaughter is without merit. The record reflects that appellant never requested or proffered an instruction on recklessness of that he objected to the court's failure to give such an instruction. It is well settled that we do not reach the merits of error not presented to the trial court and raised for the first time on appeal. *Green v. State*, 7 Ark. App. 175, 646 S.W.2d 20 (1983). Furthermore, where defense counsel does not request an instruction on a particular lesser included offense, the trial court does not have a duty to instruct the jury on all possible lesser included offenses. *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182, *cert. denied*, 452 U.S. 973 (1981).

The record in the case at bar reflects that appellant requested and proffered an instruction on negligent homicide which the trial court refused. Negligent homicide is committed by one who negligently causes the death of another person. Ark. Stat. Ann. §41-1505(1). Ark. Stat. Ann. § 41-203(4) (Repl. 1977), provides as follows:

> (4) "Negligently." A person acts negligently with respect to attendant circumstances or a result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

It is reversible error to refuse to give a correct instruction on a lesser included offense and its punishment when there is testimony furnishing a reasonable basis on which the accused may be found guilty of the lesser offense. *Glover v. State*, 273 Ark. 376, 619 S.W.2d 629 (1981). Where there is no evidence tending to disprove one of the elements of the larger offense the court is not required to instruct on the lesser one because absent such evidence there is no reasonable basis for finding an accused guilty of the lesser offense. In this type of case the jury must find the defendant guilty either of the offense charged or nothing. *Fisk v. State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982). Where, however, there is the slightest evidence tending to disprove one of the elements of the larger offense, it is error to refuse to give an instruction on the lesser included one. *Brewer v. State*, 271 Ark. 254, 608 S.W.2d 363 (1980).

We believe the trial court in the instant case was correct in refusing an instruction on negligent homicide because there was no evidence that furnished a reasonable basis on which appellant could be found guilty of the lesser offense. Appellant testified that he intentionally shot the deceased from five or six feet away. He stated that he believed the victim was armed and when the victim lunged toward him with his hand in his coat pocket which contained a bulge, appellant shot him. Appellant testified he did not intend to kill the victim but rather wound him to keep from being shot himself.

As we review the record, the evidence did not make a fact issue for the jury. There was no testimony furnishing a reasonable basis on which appellant could be found guilty of negligent homicide. Accordingly, the trial court did not err in refusing the proffered instruction on negligent homicide.

AFFIRMED.

Glaze, J., agrees.
Mayfield, J., concurs.

DIVISION 1

ARKANSAS COURT OF APPEALS

NO. CACR 85-142

Opinion Delivered January 22, 1986

CONCURRING OPINION

JOE S. WESLEY ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

MELVIN MAYFIELD, Judge

I concur in the decision of this case. The appellant's argument that he was entitled to a requested instruction on the lesser included offense of negligent homicide is correctly answered by the following statement in the state's brief:

> Ark. Stat. Ann. §41-203 (Repl. 1977) defines a negligent cuplable mental state. The commentary to that section states, "An actor charged with negligent conduct—for example, negligent homicide [§41-1505]—is assumed to have been unaware of the existence of the risk." This definition is in accord with both the trial court's ruling and the facts in the case at bar. The court, in refusing the negligent homicide instruction, stated that a failure to perceive the risk was necessary . . . . The trial court correctly refused to instruct on negligent homicide because there was no evidence to show that appellant was unaware of the risk.

Office of the Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

DONA L. WILLIAMS
CLERK

ROBIN HENTHORNE
CHIEF DEPUTY

February 19, 1986

DARRELL F. BROWN
Attorney at Law
One Union National Plaza
Suite 940
Little Rock, AR. 72201

Re. CACR 85-142 Joe S. Wesley v. State
of Arkansas

Dear Mr. Brown:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for Rehearing is denied."

Sincerely yours,
/s/ Dona L. Williams
Dona L. Williams, Clerk

DLW:mf

cc: Steve Clark
Jacque Alexander, Clerk

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,

SS.

In the Court of Appeals

BE IT REMEMBERED. That at a session of the Court of Appeals of the State of Arkansas, begun and held in the City of Little Rock, on the *19th* day of *February, 1986,* amongst others were the following proceedings, to-wit:

JOE S. WESLEY
Appellant

vs. No. CACR 85-142

STATE OF ARKANSAS
Appellee

Appeal from Pulaski Circuit Court
Fourth District
(Circuit Court No. CR85-236A)

Appellant's motion to stay mandate is granted.

IN TESTIMONY, That the above is a true copy of the *order* of said Court of Appeals, rendered in the case therein stated. I, DONA L. WILLIAMS, Clerk of said Court of Appeals, hereunto set my hand and affix the Seal of said Court of Appeals, at my office in the city of Little Rock, this *19th* day of *February*, A.D. 19*86*.

/s/ Dona L. Williams
Dona L. Williams, Clerk

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

DONA L. WILLIAMS
CLERK

ROBIN HENTHORNE
CHIEF DEPUTY

March 3, 1986

DARRELL F. BROWN
Attorney at Law
One Union National Plaza
Suite 940
Little Rock, AR. 72201

Re: CR86-25 Joe S. Wesley v.
State of Arkansas

Dear Mr. Brown:

The Court made the following order in the above styled case today:

"Petition for Review is denied. Purtle, J., not participating."

Sincerely yours,

/s/Dona L. Williams
Dona L. Williams, Clerk

DLW:rh
cc: Theodore Holder

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,

SS.

In the Court of Appeals

BE IT REMEMBERED, That at a session of the Court of Appeals of the State of Arkansas, begun and held in the City of Little Rock, on the *26th* day of *March*, 1986, amongst others were the following proceedings, to-wit:

JOE S. WESLEY
Appellant

vs. No. CACR 85-142
STATE OF ARKANSAS
Appellee

Appeal from Pulaski Circuit Court
Fourth District
(Circuit Court No. CR85-236A)

Appellant's motion to recall mandate is granted.

IN TESTIMONY, That the above is a true copy of the *order* of said Court of Appeals, rendered in the case therein stated. I,DONA L. WILLIAMS, Clerk of said Court of Appeals, hereunto set my hand and affix the Seal of said Court of Appeals, at my office in the City of Little Rock, this *26th* day of *March*, A.D. 19*86*.

/s/ Dona L. Williams
Dona L. Williams, Clerk